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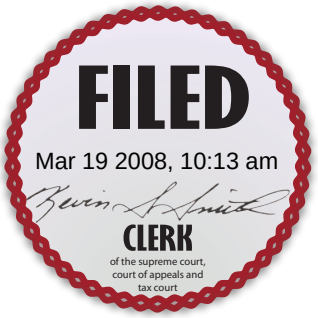
IN THE
COURT OF APPEALS OF INDIANA



IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF:

K.F.,

A Child,

and

MICHAEL B.,

Appellant-Respondent,

vs.

ALLEN COUNTY DEPARTMENT OF CHILD SERVICES,

Appellee-Respondent.

No. 02A03-0711-JV-498

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable William L. Briggs, Judge
Cause No. 02D07-0611-JT-218

March 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Appellant Michael B. ("Father") appeals the involuntary termination, in Allen Superior Court, of his parental rights to his daughter, K.F. We affirm.

Issue

Father raises several arguments on appeal that we consolidate and restate as whether the trial court's judgment terminating Father's parental rights to K.F. is supported by clear and convincing evidence.

Facts and Procedural History

The facts most favorable to the judgment indicate that on May 9, 2005, Father admitted paternity as to K.F., born on April 26, 1997, and was thereafter adjudicated by the court to be the father of K.F. On August 5, 2005, the Allen County Department of Child Services ("ACDCS") received a referral of a possible abuse and/or neglect situation in Mother's home. The ACDCS conducted an investigation and removed K.F.'s four siblings from the home.[1] K.F. was found in a senior living complex with Father and Father's mother, where both claimed to be residing at the time.

The ACDCS subsequently filed a petition alleging K.F. was a child in need of services ("CHINS"). On August 8, 2005, a detention and preliminary inquiry hearing was held during which the trial court determined that probable cause existed to believe K.F. and her four siblings were CHINS. All five children were placed in foster care. On May 9, 2006,

[1] K.F.'s siblings have different fathers who are not parties to this appeal. Because Father only challenges the termination of his parental rights to K.F., we limit our discussion herein to the facts pertaining to K.F. We further note that Mother voluntarily forfeited her parental rights to all five children and is not a party to this appeal.

following a fact-finding hearing, the trial court issued an order determining K.F. to be a CHINS. The trial court incorporated a Parent Participation Plan in its order directing Father to, among other things, obtain and maintain suitable employment, obtain a psychological evaluation and follow all resulting recommendations, attend and appropriately participate in all visitation with K.F. as directed by the ACDCS, and to pay child support for K.F.

On January 11, 2007, the ACDCS filed a petition for the involuntary termination of Father's parental rights to K.F. The termination fact-finding hearing was held on May 14 and 15, 2007. On the first day of trial, Mother voluntarily relinquished her parental rights to K.F. On July 25, 2007, the trial court entered its judgment terminating Father's parental rights to K.F. In so doing, the trial court made the following pertinent findings of fact:

* * *

> 4. It is established by clear and convincing evidence that the allegations of the Petition are true in that there is a reasonable probability that the conditions that resulted in the child's removal and the reasons for the placement outside the parent's (sic) home will not be remedied, and/or that continuation of the parent/child relationship poses a threat to the well-being of the child.
>
> * * *
>
> The father has never supported the child. The father is currently married. The father's present wife did not want him to have contact with the child, so he terminated all contact with the child for a period of sixteen (16) months from December 2005 until April 2007.
>
> The father and his wife have now separated and he wants to resume contact with the child.
>
> The father does not have the ability to parent the child. He is dependent on others for his own care and welfare. He is receiving Social Security Disability benefits. He has memory loss both past and present. He loses his way in stores when shopping. His "brother[']s" girlfriend is

his Power of Attorney (she is also receiving SSI). He has been seeing a therapist for more than a year but cannot recall her name. He had a "nervous breakdown" during the summer of 2006 and has suicidal ideations.

The child has been determined to have Depressive Disorder and her caretaker must have the ability to provide continual and close supervision, be emotional[ly] stable and understanding. The father does not have the ability to minimally fulfill the needs of the child.

5. Termination of parental rights is in the best interests of the child, [K.F.], in that the father, [Michael B.] has shown over the course of the related CHINS cause, and in the fact of a treatment plan or plans, and numerous specific services made available and/or provided, that said parent continues to be unable, refuse, or neglect to provide for the basic necessities of a suitable home for the raising of said child.

Appellant's App. at 50. This appeal ensued.

Discussion and Decision

Father claims that the trial court's judgment terminating his parental rights to K.F. is clearly erroneous. Specifically, Father claims that the ACDCS failed to prove by clear and convincing evidence that (1) the reasons for K.F.'s removal and continued placement outside the family home will not be remedied, (2) continuation of the parent-child relationship poses a threat to K.F.'s well-being, and (3) termination is in K.F.'s best interests.

Initially, we acknowledge that this court has long had a highly deferential standard of review in cases concerning the termination of parental rights. In re K.S., 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the trial court's judgment, we will not reweigh the evidence or judge the credibility of the witnesses. In re D.D., 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), trans. denied (2004). Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. Id.

Here, the trial court made specific findings in ordering the termination of Father's parental rights. Where the trial court enters specific findings of fact, we apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Bester v. Lake County Office of Family of Children, 839 N.E.2d 143, 147 (Ind. 2005). In deference to the trial court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied (2000), cert. denied (2002); see also Bester, 839 N.E.2d at 147. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. D.D., 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the trial court's conclusions or the conclusions do not support the judgment thereon. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996).

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied (1996). However, the juvenile court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. K.S., 750 N.E.2d at 837. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. Id. at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

(A) [o]ne (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

* * *

(B) there is a reasonable probability that:
  (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
  (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and,

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2) (1998 & Supp. 2007). The State must establish each of these allegations by clear and convincing evidence. Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992).

Father does not challenge the fact that K.F. was removed from his care pursuant to a dispositional decree for at least six months. Nor does Father challenge the trial court's determination that the ACDCS had a satisfactory plan for the care and treatment of K.F., namely: adoption. Father does, however, challenge the evidence supporting the remaining factors set forth above.

A. Conditions Will Not be Remedied & Parent-Child Relationship Poses a Threat

Father first claims that the ACDCS failed to prove by clear and convincing evidence that the conditions that resulted in K.F.'s removal and continued placement outside of his care will not be remedied and that continuation of the parent-child relationship poses a threat to K.F.'s well-being. Specifically, Father asserts that the ACDCS failed to show that K.F.'s

emotional and physical development ever has been, or ever would be threatened, as a result of his parental relationship with her.

Initially, we note that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, it requires the trial court to find only one of the two requirements of subsection (B) by clear and convincing evidence. See L.S., 717 N.E.2d at 209. We first review whether the trial court's finding that continuation of the parent-child relationship poses a threat to K.F.'s well-being is supported by clear and convincing evidence.

The record reveals that Father needs assistance in meeting his own personal needs. Father suffers from serious emotional and mental difficulties, including long and short-term memory loss resulting from a head injury he sustained after being hit in the head several times with a sledgehammer. As a result of this memory loss, Father oftentimes forgets what he is doing and can get lost and distracted in larger stores such as Wal Mart. Father also is unable to drive and has to rely on friends and family to take him to the grocery store and to doctor visits. Father named his mother, his "brother"[2] ("Jason"), and his brother's girlfriend ("Angelique") as his support network. However, the record reveals that his mother suffered a stroke sometime after the commencement of the termination hearings and is no longer able to assist Father. Additionally, the evidence shows that Angelique has had previous involvement with the Department of Child Services resulting in the removal and/or adoption of all four of her own children and that Jason, who has various physical limitations, also suffers from memory loss due to a car accident.

[2] Father admits that he has no biological siblings and that the "brother" he refers to is actually a friend from childhood.

At the fact-finding hearing on the termination petition, Father admitted to having a "temper" and to making poor choices as a result of his temper. Appellant's App. at 175. Father also admitted to suffering from depression and to having two mental breakdowns, one in 2000, and one in 2006, during which he had suicidal ideations.

Dr. Anthony Flores, a psychologist who works at Midwest Addiction and Psychiatric and Psychological Services, counsels children who have been abused and neglected. Dr. Flores testified that he had worked as K.F.'s counselor for approximately one-and-a-half years. Dr. Flores diagnosed K.F. with Anxiety Disorder, a disorder where the person feels "a lot of worry, apprehension, preoccupation with the future, [and] a lot of restlessness and irritability." Appellant's App. at 252. Dr. Flores further explained that K.F. "has a lot of anxiety . . . a lot of fear, so she needs to be able to be calmed down, and needs a lot [of] reassurance." Id. at 254. Dr. Flores also stated that K.F. was "easily scared," "easily angered," was moody and had "angry outbursts[.]" Id. When asked what K.F. needed in a caretaker, Dr. Flores responded, "[S]omeone that's able to understand the situation, able to have patience with her, also [someone who] is emotionally stable and able to handle stress." He further stated that K.F. needed "close supervision" from someone who could handle their own temper pretty well or they could have anger issues as a result of K.F.'s "demandingness." Id. at 255.

The record indicates that Dr. Flores reviewed Father's psychological assessment, which diagnosed Father as having Mild Mental Retardation, Disruptive Behavioral Disorder, and Organic Brain Disorder. Based on his review of Father's diagnoses and his clinical interview of Father, Dr. Flores stated that he had several concerns about Father's parenting

ability, especially with regard to Father's "explosive type" personality and his "memory issues[.]" Id. at 266, 268, 270. When asked if he had an opinion as to whether Father would potentially pose a threat to K.F.'s well being, Dr. Flores responded, "I would be concerned about the potential for physical abuse." Id. at 270. He further explained that K.F. "requires close supervision, a very demanding young lady as far as having to watch her consistently. She's also the kind of person that really asks a lot of questions. A parent that has memory issues, okay, and a parent that also has some anger problems as well, it's a disaster waiting to happen . . . ." Id. at 269.

Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. In re R.S., 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied (2003). The trial court need not wait until the child is irreversibly harmed such that her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. Id. Based on the foregoing, we conclude that the trial court's finding that continuation of the parent-child relationship poses a threat to K.F.'s well-being is supported by clear and convincing evidence.

B. Best Interests

Next, we turn to Father's allegation that the ACDCS failed to prove by clear and convincing evidence that termination of the parent-child relationship was in K.F.'s best interests.

We are mindful that in determining what is in the best interests of the child, the court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. McBride v. Monroe County Office of Family &

Children, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the children. Id. We further recognize that children should not be removed from the custody of their parents just because there is a better place for them, but because the situation while in their parents' custody is "wholly inadequate" for their survival. Bester, 839 N.E.2d at 148. However, as stated previously, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development is threatened by the parent's custody. Id.

At the time of the termination hearing, Father was not employed, was living in a one-bedroom apartment that, according to case manager Trina Riecke, was "too small for [K.F.][,]" Appellant's Appendix at 188-89, and had only recently initiated visitation with K.F. after refusing to visit her for approximately sixteen months. Additionally, Father, who was relying on his Mother, his "brother", and Angelique, for assistance in meeting his own personal needs, such as managing his finances, daily transportation, and grocery shopping, testified that he would continue to rely on these people if he were granted custody of K.F. Unfortunately, the record reveals that these people would be unavailable or inappropriate caregivers for K.F. due to their own physical ailments or previous involvement with the Department of Child Services.

We have previously held that a court may consider a parent's response to and benefit from services offered by the Department of Child Services in determining the probability of future detrimental behavior. K.S., 750 N.E.2d at 837. Additionally, we have also held that the failure to exercise the right to visit one's child demonstrates a lack of commitment to complete the actions necessary to preserve the parent-child relationship. Lang v. Starke

County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), trans. denied (2007). Here, the record reveals that shortly after establishing paternity of K.F., Father refused to exercise visitation with K.F. for sixteen months, until approximately eight weeks before the fact-finding hearing. Additionally, Pat Greimer, an in-home parenting facilitator, testified that it took Father six months to complete a six-week parenting course. She further testified that even though Father did ultimately complete the course, she had "doubts whether [Father] could understand the concepts or apply them." Appellant's App. at 295.

Case manager Riecke expressed reservations concerning Father's ability to parent as well. When questioned as to why the ACDCS was requesting termination of Father's parental rights, Riecke explained, "[T]he Department, in looking at the bigger picture, has concerns about [Father's] ability to parent over the long haul and in more complex situations. This child has been sexually molested. She has a tendency to . . . act out . . . she has overly sexualized behaviors. I worry about [Father's] ability to provide supervision and guidance for her. Also in regards to academics . . . . she definitely has some learning problems. . . . I worry about [Father's] ability to continue to help her in that area and also with her therapy and transportation, getting her to appointments that she needs . . . ." Id. at 189.

K.F.'s guardian ad litem ("GAL") also recommended termination of Father's parental rights. Although the GAL testified that she had "sympathy for [Father] regarding what appears to be a significant medical condition," she nevertheless had "grave concerns regarding his memory problems, what appears to be an anger or temper problem, and what appears to be a mood problem, where he readily acknowledges needing to separate himself

from people and isolate himself when [he] has these mood problems." Transcript at 144-45. She went on to explain, "I don't think that lends itself to being able to care for a ten year old child." Id. at 145.

Based on the totality of the evidence, we conclude that the trial court's finding that termination was in K.F.'s best interests was supported by clear and convincing evidence. See In re T.F., 743 N.E.2d 766, 766 (Ind. Ct. App. 2001) (concluding that the recommendations of the welfare case worker and child's guardian ad litem that parental rights be terminated support a finding that termination is in the child's best interests), trans. denied (2001); In re R.G., 647 N.E.2d 326, 328 (Ind. Ct. App. 1995) (stating that while mental retardation of the parent, standing alone, is not a proper ground for termination of parental rights, where the parent is incapable or unwilling to fulfill his legal obligations in caring for his child, mental illness may be considered, this includes situations where the child's emotional and physical development will be threatened), trans. denied (1995); In re D.V.H., 604 N.E.2d 634, 638 (Ind. Ct. App. 1992) (concluding that a parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that continuation of the parent-child relationship is contrary to the child's

best interests), trans. denied (1993), superceded by rule on other grounds. The trial court's judgment terminating Father's parental rights to K.F. is therefore affirmed.[3]

Affirmed.

BAILEY, J., and NAJAM, J., concur.

[3] We acknowledge that Father claims in his Appellant's brief that several of the trial court's findings were not supported by the evidence, including the trial court's findings that Father did not visit K.F. until age seven, that Father has never supported the child, and that Father was separated from his wife and now wants to resume contact with the child. Our review of the record leaves us convinced that Father's assertions here amount to an invitation to reweigh the evidence, and this we cannot do. Bester, 839 N.E.2d at 147. However, even assuming arguendo that the findings Father complains of were not supported by the evidence, to the extent that the judgment is based on those alleged erroneous findings, we find those findings to be superfluous and therefore not fatal to the judgment. See Lasater v. Lasater, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004) (stating where judgment is based on erroneous findings, those findings are superfluous and are not fatal to the judgment if the remaining findings and conclusions support the judgment). Here, the remaining valid findings and conclusions discussed in our opinion, supra, support the trial court's judgment. Any error is therefore harmless.